



State of Wisconsin  
Governor Scott Walker

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**Department of Agriculture, Trade and Consumer Protection**  
Ben Brancel, Secretary

**DATE:** November 3, 2015

**TO:** Board of Agriculture, Trade and Consumer Protection

**FROM:** Ben Brancel, Secretary  
Karley Downing, Chief Legal Counsel

**SUBJECT: ATCP 1- Administrative Orders and Contested Cases; Rulemaking Scope Statement**

**PRESENTED BY:** Karley Downing, Chief Legal Counsel

**REQUESTED ACTION:**

At the November 18, 2015, Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve a Statement of Scope (copy attached) for potential changes to current DATCP rules related to administrative orders and contested cases. This proposed rule would amend ch. ATCP 1, Wis. Adm. Code to allow division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of DATCP's Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code.

Currently, under s. ATCP 1.03(2), Wis. Adm. Code, some types of orders may be issued by DATCP's division administrators or staff, while others may only be issued by DATCP's Secretary or designee. Generally, all of these orders may be appealed under s. ATCP 1.06, Wis. Adm. Code.

The authority to grant or deny a request for hearing rests with the Secretary, under s. ATCP 1.06(3), Wis. Adm. Code. The final decisionmaker for any contested case is either the Secretary, or a designee appointed by the Secretary, as defined in s. ATCP 1.01(13), Wis. Adm. Code. If the Secretary, or his designee, is the only person who may issue many of the typical special orders of DATCP, this precludes the Secretary from exercising appellate jurisdiction in any contested case hearing where he or she has already signed the initial order. This is a specific duty of the Secretary, which should not be abrogated by rule. On the other hand, if the rule is amended, allowing special orders to be issued by the division administrator, the Secretary may then exercise the duty to oversee any division's action by granting and deciding a contested case hearing, if the special order is appealed.

The one special order that will continue to be signed by the Secretary or his designee, and not by the division, is an order determining claims in a recovery proceeding, under s. ATCP 1.08, Wis. Adm. Code. Pursuant to subch. VII of ch. 126, Wis. Stats., the Division of Trade and Consumer Protection initiates the proceeding and drafts a proposed order. Only the Secretary or designee may sign the final order in these cases, even where a contested case hearing is not needed. These claims determination orders are always a final order of DATCP, as are all decisions in other contested case proceedings and all are issued by the Secretary or designee, pursuant to § 227.47(1), Stats.

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A scope statement spells out the general purpose and scope of a proposed rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for that rule as required under § 227.135(2), Stats. This scope statement was approved by the Governor on November 6, 2015. Wisconsin statutes also require the DATCP Board to approve a scope statement before DATCP may begin to draft a proposed rule. DATCP is required to publish a draft scope statement in the Wisconsin Administrative Register, and file a copy with the Department of Administration (DOA), at least 10 days before the Board approves the scope statement. DATCP has filed the attached scope statement with the Legislative Reference Bureau for publication and with DOA as required.

If the Board approves the scope statement, DATCP will begin work to draft the permanent rule. Approval of a scope statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rule. The Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. The permanent rule will be effective when the final draft has been approved by the DATCP Board, approved by the Governor, completed the legislative review process and adopted by the Secretary.

# STATEMENT OF SCOPE

## Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No.: Ch. ATCP 1, Wis. Adm. Code (Existing)

Relating to: Administrative Orders and Contested Cases

### 1. Description of the objective of the rule:

This proposed rule would amend chapter ATCP 1 to allow division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of the Department Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code.

### 2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

Currently, under s. ATCP 1.03(2), Wis. Adm. Code, some types of orders may be issued by the Department's division administrators or staff, while others may only be issued by the Department's Secretary or designee. Generally, all of these orders may be appealed under s. ATCP 1.06, Wis. Adm. Code.

The authority to grant or deny a request for hearing rests with the Secretary, under s. ATCP 1.06(3), Wis. Adm. Code. The final decisionmaker for any contested case is either the Secretary, or a designee appointed by the Secretary, as defined in s. ATCP 1.01(13), Wis. Adm. Code. If the Secretary, or his designee, is the only person who may issue many of the typical special orders of the Department, this precludes the Secretary from exercising appellate jurisdiction in any contested case hearing where he or she has already signed the initial order. This is a specific duty of the Secretary, which should not be abrogated by rule. On the other hand, if the rule is amended, allowing special orders to be issued by the division administrator, the Secretary may then exercise the duty to oversee any division's action by granting and deciding a contested case hearing, if the special order is appealed.

The one special order which will continue to be signed by the Secretary or his designee, and not by the Division, is an order determining claims in a recovery proceeding, under s. ATCP 1.08, Wis. Adm. Code. Pursuant to subch. VII of ch. 126, Wis. Stats., the Division of Trade and Consumer Protection initiates the proceeding and drafts a proposed order. Only the Secretary or designee may sign the final order in these cases, which are similar to a final order in a contested case proceeding, as opposed to any other type of special order.

Policy Alternatives. If the department does not alter the current rules, there will continue to be a number of times that the Secretary is precluded from acting in the appellate capacity, authorized under ch. 227, Wis. Stats., and ch. ATCP 1, Wis. Adm. Code.

**3. Statutory authority for the rule (including the statutory citation and language):** Sections 93.07(1) and 93.18, Stats., and subch. III of ch. 227, Stats.

**4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:**

DATCP estimates that it will use approximately 0.10 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, holding public hearings and communicating with affected persons and groups. DATCP will use existing staff to develop this rule.

**5. Description of all entities that may be impacted by the rule:**

Any person or entity subject to a special order, issued by a division, will have the opportunity to request a hearing on appeal, which will be considered by the Secretary or his designee, and, if granted, will have the opportunity that the Secretary may be the final decisionmaker.

**6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:**

None.

**7. Anticipated economic impact**

This rule change is anticipated to have no economic impact.

**Contact Person:** Cheryl Daniels, Assistant Legal Counsel, DATCP; Phone (608) 224-5026



Ben Brancel  
Secretary  
Department of Agriculture, Trade and Consumer Protection

9-8-15  
Date Submitted